IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 855 of 1988

with

CRIMINAL APPEAL No 872 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 and 2 :- Yes & 3 to 5 :-No.

MUKESH NATVARLAL MODI

Versus

H.S.BAROT

Appearance:

1. Criminal Appeal No. 855 of 1988

Ms S.M.Ahuja with Mr.M.B.Ahuja, Advocates for the appellants.

Mr.Sunil C.Patel, Addl. Standing Counsel for respondent No.1.

Mr.K.C.Shah, Additional Public Prosecutor for respondent No.2.

2. Criminal AppealNo 872 of 1988

Mr. Arun H.Mehta, Advocate for the appellant.

Mr. K.C.Shah, Additional Public Prosecutor for respondent No.1.

Mr. Sunil C.Patel, Addl. Standing counsel for respondent No.2.

CORAM : MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.R.DAVE
Date of decision:26-30/09/97 and 1-10-97

ORAL JUDGMENT :PER K.R.VYAS,J.

These two appeals have been preferred by original accused Nos.1 and 2 of Sessions Case No.259/87, who , at the end of the trial, have been convicted by the learned City Sessions Judge, Ahmedabad, for offence punishable under section 21 of the Narcotic Drugs and Psychotropic Substances Act,1985 (hereinafter referred to as "the NDPS Act"). Accused No.1 was convicted on the count of purchase of brown-sugar and was sentenced to suffer 10 years R.I. and to pay a fine of Rs.1 lac indefault to undergo further R.I. for one year. The said accused was also convicted on the count of being in possession of brown-sugar and was sentenced to suffer R.I. for ten years and to pay a fine of Rs.1 lac indefault to undergo further R.I. for one year. The learned trial Judge ordered the substantive substances imposed upon accused No.1 on the above counts to run concurrently. Accused No.2 was convicted for the offence punishable under section 21 of the NDPS Act for selling brown-sugar to accused No.1 and was sentenced to suffer R.I. for ten years and to pay a fine of Rs. 1 lac and in default to undergo further R.I. for one year.

As both these appeals arise out of the judgment and order of conviction and sentence passed by the learned City Sessions Judge in Criminal Case No.259/87, we have heard both these appeals together and are being disposed of by this common judgment.

The prosecution case, in brief, can be stated asunder:

On June 6,1987, Mr.A.A.Maulvi (P.W.2) the then Inspector of Customs (Preventive) , Ahmedabad, was contacted by an informant to give him some information. Mr. Maulvi thereafter contacted Mr.H.S.Barot (P.W.1) the then Superintendent of Customs with the informant. The informant gave information to Mr. Barot to the effect that accused No.1 has in his house brown-sugar or heroin. On receiving such information Mr.Barot prepared a record of that information and put the same in an envelope, which was sealed and passed on that sealed envelope to

Mr.H.D.Desai, Assistant Collector of Customs (Preventive). After certain discussion with Mr. H.D.Desai regarding the modality of carrying out the raid at the house of accused No.1, a decision was taken to carry out the raid in the morning of June 7,1987. Accordingly at about 6.00 a.m. on June 7, 1987, Mr. Barot, Mr.Maulvi and Mr. R.N.Rathod (P.W.3) the then Inspector, assembled at the Customs House, Ahmedabad. Mr. Barot prepared and issued a search warrant in the name of Mr.Maulvi ordering and authorising him to search the house of accused No.1. Under the direct supervision of Mr.Barot, it was also decided to accompany the raiding party. Mr.Barot instructed Mr. Maulvi to arrange for and to take with him two Panch witnesses. The raiding party proceeded in two motor vehicles towards the house of accused No.1. On way to the house of accused No.1, Mr.Maulvi, from near Jamalpur Gate, summoned two Panch witnesses and took them with him in the car. The members of the raiding party assembled at a short distance away from the house of accused No.1, which is situated on the first floor of bungalow No.1 Ranchhodrai Society at Gordhanwadi Tekra. Mr. Maulvi showed the search warrant to accused No.1 and obtained his signature thereon and the endorsement about the execution of search warrant was also made thereon and the signatures of the Panchas were also obtained on that document. Mr.Maulvi, as Searching Officer, has also put his signature thereon. Accused No.1 was informed about the purpose for which the party had approached his house. He was also informed that if he so desired, he would search the persons of the members of the raiding party to which accused No.1 showed no inclination . At the time of the search of the house of accused No.1, other members of the family of accused No.1 viz his father Natverlal, his wife Alkaben and his wife's sister Deepaben and two minor children were present. When the search was carried out in the first room or the drawing room of the house, nothing incriminating was found therefrom. However, when the second room or the inner room was searched, from a top of a cupboard, from a hollow space between the top of the cupboard and the loft above it, the raiding party recovered 25 sachets or 25 small polythene bags containing brown powder. On being asked about these sachets by the raiding party, accused No.1 stated that those sachets contain brown sugar or heroin. From that inner room, three documents (1) a communication from the Telephone Department addressed to accused No.1 in connection with transfer of his telephone from his shop to his house, (2) a telephone bill and (3) a bill issued in the name of accused No.1 by a grain merchant, were also attached. Out of 25 sachets containing brown powder, one was opened and the powder

containing therein was weighed. The powder weighed about 3 grams. The empty sachet weighed one gram. The powder was then replaced in the sachet which was then repacked. The remaining 24 sachets were individually weighed together with the powder they contained and each of those 24 sachets with the powder weighed about 4 grams. Out of 24 sachets, three were sorted out as samples. Each one of these three sachets was placed in a separate brown coloured envelope. On those brown coloured envelopes, necessary packing slips were affixed containing the description of the case, and the contents. Below that description, signatures of accused No.1 and the Panchas were obtained and Mr. Maulvi put his signatures thereon as a Seizing Officer. By means of packing slips thus prepared, the three envelopes were packed and were properly sealed with sealing wax using the brass seal of the Customs Office. the remaining 22 sachets were then placed in a plastic bag which was put in a box or a carton. That carton was wrapped in a news paper and on that news paper wrapping a packing slip containing the description of the case and the contents and bearing the signatures of the Panchas, accused No.1 and Mr.Maulvi was affixed. The carton was thereafter packed by means of cotton strap and was properly sealed by means of sealing wax, using the brass seal of the Customs Department. A panchnama of all these facts, that took place and transpired at the house of accused No.1 was drawn at his house. Thereafter Mr.Barot and members of the raiding party came to the Customs House taking accused No.1 with them after instructing father Natverlal and Alkaben-the wife of accused No.1 to follow them and to come to the Customs House. At the Customs Office, Mr. Barot recorded the statements of Natverlal and Alkaben under section 67 of the NDPS Act. Mr.Barot thereafter started informal interrogation of accused No.1 with a view to know the source of 25 sachets of brown-sugar, which were recovered from the house of accused No.1 and accused No.1 stated that he has purchased the brown-sugar from accused No.2, whose name and address were also given to Mr. Barot.

Mr.Barot thereafter prepared and issued a second search warrant authorizing and ordering Mr. Rathod (P.W.3) to go to the house of accused No.2 and search her house. Thereafter Mr.Barot started recording the formal statement of accused No.1 under section 67 of the NDPS Act. In the meantime, in pursuance of the search warrant issued in his name, Mr. Rathod with some other Customs Inspector, approached the house of accused No.2 and searched her house, but nothing incriminating was found from her house. However, Mr. Rathod returned to Customs

House taking accused No.2 with him when Mr. Barot was busy recording the statement of accused No.1. In the midst of the recording of the statement of accused No.1, accused No.2 was shown to accused No.1 and thereupon accused No.1 identified accused No.2 as the person from whom he had purchased the brown-sugar. In token of this identification, the thumb impression of accused No.2 was obtained in the middle on one side of the page on which at that time the record of the statement of accused No.1 was being made by Mr.Maulvi under the supervision of Mr.Barot.Thereafter the recording of the statement of accused No.1 was completed wherein he has admitted having purchased 30 sachets of brown-sugar from accused No.2 some five days prior to the date of the recording of the statement. He also admitted having sold therefrom five sachets to different persons. He further admitted having purchased four sachets of brown-sugar from accused No.2 fifteen days prior to the date on which their statements were recorded.

Mr. Barot thereafter recorded the statement of accused No.2 under section 67 of the NDPS Act. Then the proceedings of the case were drawn out in the form of a note in a note-sheet and then under the orders of Mr., Barot, Mr. Maulvi arrested the two accused on the same evening at about 8.00 p.m., produced them before the concerned Metropolitan Magistrate with the production report.

On the next day, four muddamal articles (the three envelopes each containing one sachet and the carton containing 22 sachets found from the house of accused No.1) were produced before the learned Metropolitan Magistrate for appropriate orders. During the course of investigation conducted and carried out by Mr.Barot, one envelope out of three was sent to the Central Revenue Control Laboratory at New Delhi for the analysis of the contents thereof being made and a report of the analysis being submitted. Mr. Johari (P.W.5) accordingly analyzed the contents and submitted his report stating that the brown powder contained in the sachet showed the presence of diacetyl morphine and the substance was covered under the NDPS Act. On receipt of the said report, Mr.Barot filed a complaint against the two accused before the learned Chief Metropolitan Magistrate, who, after following the procedure, committed the case to the learned City Sessions Judge, Ahmedabad.

The Charge, Ex.4, was framed against the accused to which they denied and according to them they are innocent and they have been falsely framed up in this

case by the Customs Authorities. According to accused No.1, at about 8.00 p.m. on the day of the incident i.e. on June 7,1987, he had returned from the night-shift of his auto-rickshaw plying and was standing near his house, and at that time some customs officers forcibly lodged him into a motor car and whisked him away to the customs office where he was severely beaten. It is the say of accused No.1 that at the customs office, the Customs Officers threatened to brand him by means of red hot brick and under that threat they obtained his signatures on some 30 to 40 blank papers and on some brown envelopes and thereafter he was produced before the learned Metropolitan Magistrate at the Magistrate's residence. According to accused No.1 his house was not at all searched by the Customs Officers and nothing was found from his house. As far as the documents alleged by the prosecution to have been seized from his house, it is the case of accused No.1 that these documents were attached from his pocket by the Customs Officers. In substance, accused No.1 has denied his involvement in the case in toto.

According to accused No.2, while pleading not guilty to the charge, she has also denied having ever sold brown-sugar or any incriminating substance to accused No.1. According to her, the Customs Officers had come to her house and had brought her to the Customs Office saying that she would be relieved after her statement was recorded. She has denied the prosecution case that at the customs office she was identified before Mr.Barot by accused No.1 as the person from whom accused No.1 had purchased brown-sugar. She has also denied that Mr.Barot had recorded her statement, Ex.16. According to her she was taken from her house to the Customs House and was made to sit in a garden and that her statement was never recorded. However, the Customs Officers obtained her thumb impressions on some blank papers. The learned trial Judge, after considering the documentary as well as oral evidence led before him, found that the prosecution has successfully established the charge levelled against the accused and, therefore, he by his judgment and order dated 16th September, 1988 convicted both the accused and sentenced them as stated in paragraph 1 of this judgment.

We have given detailed facts from the evidence of the prosecution witnesses who on all material aspects have given identical versions and, therefore, it is not necessary for us to narrate the evidence of each of the prosecution witnesses in this judgment. In light of the above facts on record, we have to consider the alleged involvement of the accused in the commission of the

offences and to find out as to whether the learned trial Judge has committed any error in convicting the accused and passing the order of sentence.

Ms Ahuja, learned Advocate, appearing for accused No.1, has challenged the order of conviction by contending that accused No.1 has been falsely involved in the case as no raid was carried out at his house and nothing incriminating was found from his house. Mr.A.H.Mehta, learned Advocate, appearing for accused No.2, has contended that since there is no evidence worth its name, except the statement of co-accused i.e. accused No.1, produced by the prosecution involving accused No.2 in the commission of the offence in question, no conviction can be based on the basis of the statement of the co-accused. Now, as far as the present case is concerned, the prosecution has relied on the evidence of Customs Officers Mr. Barot (P.W.1, Ex.10), Mr.Maulvi (P.W.2,Ex.30) and Mr. Rathod (P.W.3, Ex.36) and Panch witness Mohmad Aslam (P.W.4, Ex.40). It is to be noted that it is not the suggestion of the defence that any of the three Customs Officers and the Panch Witness has any hostility with any of the accused. It is also not shown that the Panch witness has any personal interest in the success of this prosecution case. From the evidence of these witnesses it is clear that three documents, Exs.32,33 and 34 were recovered from the house of accused No.1. It is the consistent say of these prosecution witnesses that the document Ex.32 is the bill of grain merchant of Laxmi Traders showing the purchase of wheat by accused No.1. Mr. Barot has recorded the statement of Kanubhai the owner or partner of Laxmi Traders at Ex.21 and in that statement Kanubhai has referred to this bill Ex.32 as having been issued by his shop in the name of accused No.1 in respect of the sale of wheat by his shop to accused No.1. Ex.33 is the letter from Telephone Department addressed to accused No.1 and that letter is in connection with the application of accused No.1 to transfer his telephone from his shop to his residence and Ex.34 is the Telephone bill in the name of accused No.1. When all these documents Exs.32,33 and 34 were recovered and when the signature of accused No.1 was also obtained on each of these documents, we have to accept the fact that the search of the house of accused No.1 was carried out. However, it is the say of accused No.1 in his statement recorded under section 313 of the Criminal Procedure Code that these documents were, in fact, recovered from his pocket while he was standing outside his house. It is

not possible to accept the say of accused No.1 for the simple reason that considering the dates mentioned in the said documents, which are stale viz bill,Ex.32, dated 10-4-87 of which the payment was made on 18-5-87, letter, Ex.33 , dated 25-2-87 and the telephone bill ,Ex.34, dated 1-5-87 , accused No.1 would have no necessity to keep these documents in his pocket.

Apart from the evidence of these prosecution witnesses, the prosecution has also relied upon the statement, Ex.12, of Natverlal-the father as also the statement Ex.13 of Alkaben-the wife of accused No.1 recorded under section 67 of the NDPS Act. The learned counsel for the accused have contended that these statements recorded before the Customs Officer are inadmissible in evidence. This contention is not well-founded in view of the decision of this Court in Mangalsingh Bhansingh Rathod vs State of Gujarat, 1988 (2) G.L.R.1028 wherein it is held that all the provisions of Chapter XII of the Criminal Procedure Code cannot be attracted in respect of narcotics offences investigated by authorized Officers of Customs, Excise and other department and such authorized Officers are not Police Officers and statements made before them are not in admissible in evidence. This Court, in fact, negatived the contention that confessional and incriminating statements of the accused have been made before the authorized Excise Officers as if the said Officers are Police Officers and, therefore, the statements are directly hit by sections 25 and 26 of the Evidence Act. In view of this, we find no difficulty in accepting the statements obtained by the Customs Officers not only of Natverlal at Ex.12 and Alkaben at Ex.30 but also the statements of the accused. Reading the statements of Natverlal and Alkaben , it is clear beyond any manner of doubt that the raid had been carried out at the house of accused No.1. These statements also refer to the sachets of brown-sugar having been recovered from the house of accused No.1 during the raid. It is true, and which appears to us to be quite natural, that in their statements the father as well as wife of accuse No.1 have stated that they were totally unaware of the sachets of brown-sugar having been kept by accused No.1 in their house. However, the fact remains that 25 sachets of brown-sugar were in fact recovered from the house of accused No.1. In the statement, Ex.15, also accused No.1 has clearly admitted the fact of the raid having been carried out at his house. He has also admitted the statements of his father as well as his wife having been recorded and has also admitted the documents Exs.32,33 and 34 having been attached from his house. He has

further admitted that he had purchased 30 sachets of brown-sugar at the cost of Rs.6000/- from accused No.2 some five days prior to the date of the statement. In fact, he himself had given the address of accused No.2 and on the basis thereof, Mr.Barot authorized Mr. Rathod to search the house of accused No.2. It is true that in the search carried out by Mr. Rathod at the house of accused No.2 , nothing was recovered. However, when Mr.Rathod returned with accused No.2 at the Customs House when the statement of accused No.1 was being recorded, accused No.1 immediately identified accused No.2 as the person from whom he purchased 30 sachets of brown-sugar some five days prior to the date of his statement and in token of that identification, the thumb impression of accused No.2 was also obtained on one side somewhere in the middle of the page of the statement , Ex.15, of accused No.1. The fact that accused No.2 has also admitted in her statement that some officers had come to her house and told her to accompany them would corroborate the story of the prosecution inasmuch as Mr.Rathod had gone to the house of accused No.2. Thus, the case against the accused is duly proved in view of the material on record. Apart from the statement of co-accused viz accused No.1, in our view, the prosecution has led independent evidence against accused No.2 also. In Naresh J.Sukhawani vs Union of India, AIR 1996 SC 522, the Supreme Court has ruled that statement made before Customs Officers against co-accused under section 108 of the Customs Act incriminating himself and accused in passing off foreign currency out of India can be used as substantive evidence connecting the accused with contravention of the provisions of the Customs Act and it is not a statement recorded under section 161 of the Criminal Procedure Code. Therefore, we see no merit in the submission of Mr. Mehta that on the basis of the statement of the co-accused i.e. accused No.1, accused No.2 cannot be convicted for the offence with which she was charged. In that view of the matter the decision in Param Hans Yadav and Sandanand Tripathi vs State of Bihar and ors AIR 1987 SC 955 relied upon by Mr. Mehta is not applicable to the facts of this case. The Supreme Court in the said decision has ruled that the confession of a co-accused is not substantive evidence against the other co-accused persons in the trial but could only be used for lending reassurance if there be any other substantive evidence to be utilized or acted upon. There cannot be any dispute with respect to the principles laid down in the said decision. However, as stated above, in the instant case, the prosecution has over and above relying upon the statement of the co-accused has proved the case against accused No.2 with other materials. Thus, in our

opinion, the prosecution has successfully established the charge levelled against the accused, and no error whatsoever is found to have been committed by the learned trial Judge in convicting the accused.

Now, let us deal with certain technical contentions raised on behalf of the accused. Mr. A.H.Mehta, learned counsel contended that even though Mr.Maulvi (PW 3) received the information regarding the accused No.1 being in possession of brown-sugar in question which was concealed by him in his house, had not recorded the said information in writing and instead took the informant to the higher officer Mr.Barot (PW 2) and therefore the prosecution had withheld the first information given to Mr.Maulvi (PW 3). In the submission of Mr. Mehta, thus there is a breach of the provisions of section 42 (1) of the NDPS Act. The learned counsel for the accused have further submitted that as the search of the house of accused No.1 was carried out in breach of the provisions of section 50 of the NDPS Act, which is mandatory in nature, no order of conviction can be passed in asmuch as the search was admittedly carried out by Mr. Maulvi who was not a Gazetted Officer but was authorized by the Gazetted Officer Mr.Barot and since Mr. Maulvi had not taken accused No.1 to the Gazetted Officer or to the nearest Magistrate, the search carried out by Mr.Maulvi was contrary to the provisions of section 50 and, therefore, the order of conviction vitiates .

In order to appreciate the contentions raised by the learned counsel for the accused, it is necessary to refer to the provisions of sections 41, 42 and 50 of the NDPS Act, which read as under:

"41. Power to issue warrant and authorisation

(1) A metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer of gazetted rank of the departments of central excise, narcotics,

customs, revenue intelligence or any other department of the Central Government or of the Border Security Force ,as is empowered in this behalf by general or special order by the Central Government or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance, or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorized the arrest or search or the officer who is so authorized under sub-section (2) shall have all the powers of an officer acting under Section 42.

42. Power of entry, search, seizure and arrest without arrest or authorisation - (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under

Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance and

(d) detain and search and, if he thinks [A proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance.

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

50. Conditions under which search of persons shall be conducted - (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42

or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female."

Reading the provisions of section 41 , it is clear that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class, specially empowered by the State Government, is competent to issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search , whether by day or by night , of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or any document or other article which may furnish evidence of the commission of such offence is kept or concealed. Therefore, an officer of Gazetted rank of the departments stated therein, including Customs and Central Excise Department, is empowered to arrest a person or search a building, conveyance or place under sub-section (2) of section 41 or can authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such person or search a building, conveyance or place. Section 42 empowers such officers as stated in section 41(2) to enter into and search and in case of resistance break open any door and remove any obstacle to such entry and seize, between sunrise and sunset, any such narcotic and psychotropic substance which he has reason to believe to be liable to confiscation and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV , and detain, search and arrest, even without warrant or authorisation, such person whom he has reason to believe to have committed any offence punishable under Chapter IV of the NDPS Act. However, if there is reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender , the officer can search the building, conveyance or enclosed place at any

time between sunset and sunrise, under proviso to section 42(1) and in that case a duty is cast on the officer to carry out such search only after recording the grounds of his belief and taking down in writing the information he has received and he is also required to take down the information in writing and send a copy thereof to his immediate superior officer.

Keeping these provisions in mind, now let us consider the first submission advanced on behalf of the accused. It is contented that even though Mr.Maulvi, who received the information regarding the accused No.1 being in possession of brown-sugar which was concealed by him in his house, he had not recorded the said information in writing and instead took the information to the higher officer. It is, therefore, submitted that Mr. Maulvi had withheld the first information. This contention can well be answered in the negative for the reasons that the powers enumerated in sections 41 and 42 are quite different. Sub-section (1) of Section 41 speaks about the power to arrest and search by a Metropolitan Magistrate, or a Magistrate of the First Class or any Magistrate of the Second Class,and sub-section (2) thereof empowers any Gazetted officer of the departments enumerated therein by a general or special order either by the Central Government or by the State Government , if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance or any document or other article in connection therewith has been kept or concealed in any building, conveyance or place, whether by day or by night, to arrest such person or carry out search of such place, or to authorise any subordinate officer superior in rank to a peon, sepoy or a constable to do so. However, if the arrest of such a person or search of the building ,conveyance or enclosed place and the seizure of the goods or incriminating articles kept or concealed therein is to be made between sunrise and sunset , in such a situation of extreme urgency , power of entry, search, seizure and arrest without warrant or authorisation is conferred under section 42. Thus if the officer empowered under section 41 has enough or sufficient time to consult his superior officer, he is not expected to exercise powers under section 42. However, that officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) have all the powers of an officer acting under section 42. From the wordings of sub-section (2) of section 41 that

," Any such officer of gazetted rank of the departments of.....if he has reason to believe ...", it is clear that such officer who is informed by any person also includes the officer under section 42 .

In the present case though Mr. Maulvi (P.W.3) received the information from the informant and who was duly authorised by Mr. Barot, who is a Gazetted Officer of the Customs Department and was duly empowered by the appropriate Government under sub-section (2) of section 41, instead of proceeding further with the case in exercise of the powers under section 42, took the informant to Mr.Barot (P.W.2) , a Gazetted Officer; the informant gave the information to Mr. Barot who took down the same in writing, kept in a sealed cover and thereafter authorised Mr. Maulvi to exercise powers under sub-section (2) of section 41 by carrying out search of the premises of accused No.1 and to seize the offending goods and incriminating articles , if found , therefrom. In view of the fact that there was enough time inasmuch as the information was conveyed in the evening of 6th June, 1987 and was decided to raid the premises on the next day morning i.e. on 7th June, 1987, Mr. Maulvi was absolutely justified in not exercising the powers under section 42 and consequently was not under obligation to write down the information from the informant. We, therefore, do not find any breach of the provision of section 42 having been committed by the prosecution in conducting the search and seizure of the premises of accused No.1. We , therefore, reject the submission of Mr. Mehta.

It was next contended by Mr. Mehta that as the search was admittedly carried out by Mr.Maulvi, who was not a Gazetted Officer but was authorised by Mr.Barot, a Gazetted officer and since Mr.Maulvi had not taken accused No.1 to the Gazetted officer or to the nearest Magistrate, the search carried out by him was contrary to section 50 and therefore the trial itself is vitiated. In support of this submission, reliance is placed on the decision of the Supreme Court in State of Punjab vs Balbir Singh AIR 1994 SC 1872. In that case the Supreme Court has held that on prior information, the empowered officer or authorised officer while acting under Section 41(2) or Section 42 should comply with the provisions of section 50 before the search of the person is made and such person should be informed that if he so desires, he shall be produced before a gazetted officer or a Magistrate as provided thereunder and that it is obligatory on the part of such officer to inform the person to be searched and if such person so requires

failure to take him to the gazetted officer or the Magistrate would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial, and that after being so informed whether such person opted for such a course or not would be a question of fact.

Mr. K.C.Shah, learned Additional Public Prosecutor, however, has placed reliance on paragraph 22 of the said judgment of the Supreme Court wherein it is observed that:

> "Both under sections 41 and 42, the officers empowered can enter and search the place and also arrest the person suspected to have committed the offence either on the basis of his own knowledge or on the basis of information reduced to writing.If an arrest is made and the person is to be searched, then as noted above, section 50 comes into operation and the search of the person has to be carried out in the manner provided thereunder....."

In the submission of Mr. Shah, in view of the observations of the Supreme Court, section 50 in the instant case has no application as in the instant case the search of accused No.1 was not made but instead the premises of accused No.1 was searched. Reading the provision of section 50, it appears that the provision is introduced to avoid any harm to the innocent person and to avoid raising allegations of planting or fabrication by the prosecuting authorities. It, therefore, lays down that if a person to be searched so requires, the officer who is about to search under the provisions of sections 41 to 43, shall take such person , without any unnecessary delay to the nearest Gazetted officer of any of the departments mentioned in sub-section (2) or to the nearest Magistrate. When the Legislature has not used the word "premises" alongwith the word "person" it is with a definite purpose, namely to protect a person, who is to be searched, from being duped by the prosecuting authorities. However, as far as premises are concerned, they have to be searched by the authorised officer under the provisions of section 41(2) or section 42 of the NDPS Act.

The learned counsel for the appellants ,however, submitted that the use of the word "person" in section 50 is required to be broadly construed to mean a person and his building, conveyance or place in his possession of occupation including household articles like handbag,

attache-case, a cloth bag and the like wherein narcotic drug or psychotropic substance is kept or concealed or any document or other article which may furnish evidence in respect of which any offence punishable under Chapter IV of the NDPS Act has been committed. To make this submission good, reliance is placed on the decision of the Supreme Court in Ali Mustaffa Abdul Rahman Moosa vs State of Kerala, AIR 1995 SC 244. In that case the appellant was found to be in possession of 780 gms of charas kept in a bag in the first class waiting room of the railway station at Quilon. On being questioned, the appellant took out a small packet of charas from his bag and handed it over to the raiding party. On further search the raiding party recovered three big packets of charas from the bag which was in possession of the appellant . The seizure of charas was effected in presence of the witnesses on the spot itself and the contraband was taken in possession after making the mahazar. In this facts situation, the Supreme Court held that where a police officer on receiving information that a person is in possession of contraband (charas), wants to subject him to search, it is the duty of the police officer to give option to the person to be searched as to whether he desired to be searched in the presence of a Gazetted officer or a Magistrate as envisaged by section 50, and the failure to provide that option to the accused vitiates his conviction inasmuch as the provisions of section 50 are mandatory and the non-compliance whereof vitiates the conviction. It is not necessary that the person who is about to be searched should by himself make a request. The Supreme Court has laid down the above proposition of law in respect of the word "person" appearing in section 50 , when the accused was waiting in the first class waiting room of the railway station having a bag in which packets of charas were kept. There was no search of the premises i.e. building, conveyance or place. While accepting the proposition laid down by the Supreme Court , we feel that the Supreme Court in this case has reiterated the law already settled in Balbir Singh's case (supra). Therefore, the ratio laid down in this judgment is applicable only to cases where search of a person is to be effected . In our opinion, word "person" appearing in section 50 would mean a person himself who is bodily required to be searched or a person found with his bag and baggages and the like wherefrom any narcotic and psychotropic substance is kept or concealed it is only when such a person is required to be searched, a duty is cast on the police officer or the empowered officer or the authorised officer to produce such person to be searched before a Magistrate or a Gazetted officer. However, this would not include search

of a " building, conveyance or place" as contemplated in section 41 and 42 as, in our opinion, search of a building , conveyance or place means a premises i.e. building, conveyance or place wherein it is suspected or there is reason to believe that any narcotic or psychotropic substance is kept or concealed. In our opinion, therefore, on a true and correct interpretation of sections 41 and 42 read with section 50 of the NDPS Act, search of a building, conveyance or place means such building, conveyance and place alongwith the articles and things lying therein wherefrom any narcotic and psychotropic substance is kept or concealed as contemplated in sections 41 and 42, whereas search of a person means a person himself who is bodily required to be searched or a person found with his bag and baggages and the like wherefrom any narcotic and psychotropic substance is kept or concealed, as contemplated in section 50 .

At this stage, it is worthwhile to refer to the decision of the Supreme Court in Namdi Francis Nwazor vs Union of India and anr 1 (1997) Current Criminal Reports, 27 (SC) . It was a case wherein the petitioner a Nigerian national, was leaving India on 23-6-87 by Air India Flight No.AI-860 from Delhi to Lagos via Bombay . He had reported for customs clearance at the Air India counter at the Indira Gandhi International Airport, New Delhi. A team of the Narcotics Control Bureau present at the Airport suspected the petitioner and decided to check his baggage. The petitioner was first asked if he was carrying any narcotics or other contraband goods and on his refusal his luggage was searched. At the point of time where the actual search took place, he was carrying two hand bags but nothing incriminating was found therefrom. He had, however, booked one bag which had already been checked in and was lodged in the Aircraft by which he was supposed to travel. This bag was called to the Customs counter at the airport for examination. On examination, it was found that it contained 153 cartons of Tetanus Vacine. On being opened it was noticed that 152 cartons contained ampules whereas the remaining one carton carried polythene packet containing brown coloured powder packet with black adhesive tape. It weighed about 180 gms and since it was suspected to be brown-sugar it was seized under a Panmchnama. The suspected contraband article was divided into three parts and one part was sent for scientific examination which revealed that it contained heroin. After the usual tests the charge was laid against the petitioner and the trial Court, after examining the evidence on record found the petitioner guilty under sections 21 and 23 read with section 28 of

the Act and convicted him thereunder. On appeal the main contention urged by his counsel was that the prosecution had failed to establish that the baggage containing the incriminating articles belonged to him and that the prosecution had violated the mandate of sections 50 and 57 of the Act. However, before the Supreme Court the question was confined to the non-compliance of section 50 of the Act only. In the context of these facts , the Supreme Court held that :

> "2. Two things become crystal clear, (i) that at relevant point of time the bag from which the incriminating articles were found was not in the actual possession of the petitioner when he was searched at the Airport , and (ii) the prosecution does not contend that it had informed him that he had a choice of being examined in the presence of a Gazetted Officer or a Magistrate....

3. On a plain reading of sub-section (1) of section 50, it is obvious that it applies to cases of search of any person and no search of any article in the sense that the article is at a distant place from where the offender is actually searched. This position becomes clear when we refer to Sub-section (4) of section 50 which in terms says that no female shall be searched by anyone excepting a female. This would, in effect, mean that when the person of the accused is being searched, the law requires that if that person happens to be a female, the search shall be carried out only by a female. Such a restriction would not be necessary for searching the goods of female which are lying at a distant place at the time of search. It is another matter that the said article is brought from the place where it is lying to the place where the search takes place but that cannot alter the position in law that the said article was not being carried by the accused on his or her person when apprehended. We must hasten to clarify that if that person is carrying a hand bag, or like and the incriminating article is found therefrom , it would still be a search of the person of the accused requiring compliance with Section 50 of the Act. However, when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom, it cannot attract the requirements of Section 50 of the Act for the simple reason that it was not found on the accused person. So,on the facts of this case it is difficult to hold that Section 50 stood attracted and non-compliance with that provision was fatal to the

prosecution case."

This decision would squarely apply to the facts of the present case. In the present case the search of the premises of accused No.1 was made and contraband sachets of brown-sugar were recovered from a hollow space between the top of the cupboard and the loft . Thus the sachets of brown-sugar lying in the premises were recovered by the authorised officer Mr.Maulvi acting under Section 41(2) and they were not recovered while carrying out search of the person of accused No.1, as contemplated under section 50 of the NDPS Act. In that view of the matter, in our opinion, since the premises of the accused No.1 were searched and as the words "to arrest such a person or search a building, conveyance or place" incorporated in sections 41 and 42 are not incorporated in section 50 and only the word "person" is used , and rightly so, in our opinion by excluding the words "building, conveyance or place" , there was no question of offering option to accused No.1 whether he wanted to be produced before a Magistrate or a Gazetted Officer before carrying out the raid of his premises and therefore section 50, in this case, is not attracted at all.

Learned counsel appearing for the accused have relied on one more decision of the Supreme Court in the case of Mohinder Kumar vs The State ,Panaji,Goa AIR 1995 SC 1157 to make their submission good about the mandatory requirements of sections 42 and 50 of the NDPS Act. In this case the Sub-Inspector of police on the evening of January 20, 1990, while on patrolling duty in a jeep reached Anjuna Out-post at village Vagator. After parking his jeep, he and the the police party accompanying him except the Head Constable alighted from the vehicle and reached the house No.591 at Small Vagator. The police noticed two persons sitting in the verandah of that house and on seeing them they hurridly entered the house. This aroused the suspicion of the Sub-Inspector whereupon he and the police party went to the house and directed the accused persons to stay where they were . Panchas were called and questioned the accused persons. He saw a while plastic bag lying by the side of the accused Mohinder Kumar and on search he found two polythene packets of charas like substance. They were attached and after taking down samples therefrom they were sealed. In the said case, admittedly, the search was carried out between sunset and sunrise by the Sub-Inspector of Police without having search warrant or authorisation and, therefore, under proviso to section 42(1), the police officer was required to record the

grounds of his belief which admittedly he did not record at any stage of the investigation subsequent to his realising that the accused persons were in possession of the charas and did not forward a copy of the grounds to his superior officer as required by Section 42(2) of the NDPS Act. Moreover, in that case, the Charas was in fact seized from the pocket of the pant of the accused i.e. from the person and, therefore, the Supreme Court held that as the mandatory requirement of Sections 42 and 50 having not been complied with, the accused were entitled to be acquitted. This judgment in Mohinder Kumar's case can be distinguished on facts inasmuch as in the present case the raid of the house of accused No.1 was not carried out between sunset and sunrise. Moreover, Mr.Maulvi had the search warrant and the authorisation with him issued by Mr.Barot, the empowered Gazetted officer of the Customs Department, as contemplated under section 41(2) . Therefore, under the proviso to section 42 (1) a duty is cast on the officer searching the premises only if he has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, that he can enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. On the contrary, Mr. Maulvi took sufficient care while carrying out the raid at the house of accused No.1 by informing accused No.1 that if he so desired, he can search the persons of the members of the raiding party. Therefore, the reliance placed by the learned counsel on the decision of the Supreme Court in Mohinder Kumar's case (supra) is of no assistance to them. The foregone conclusion of this discussion is that the appeals are devoid of any merit and needless to say the learned trial Judge was perfectly justified in convicting the accused.

In the result the appeals fail and they are dismissed.

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